No. 89-565

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

UNITED TRANSPORTATION UNION, et al.,
Petitioners,

v.

CSX TRANSPORTATION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT CSX TRANSPORTATION, INC.'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Did the Second Circuit properly classify as a minor dispute within the meaning of the Railway Labor Act a disagreement between a railroad and its unions whether the railroad's collective bargaining agreements and past practices permitted the abolishment of positions no longer needed after the sale of a line of railroad?

2. Do the Federal District Courts exercise dual jurisdiction with Adjustment Boards over minor disputes?

RULE 28.1 LIST

Respondent CSX Transportation, Inc. is a wholly-owned subsidiary of CSX Corporation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 28.1 LIST i

TABLE OF AUTHORITIES iv

COUNTERSTATEMENT OF THE CASE 2

District Court Proceedings 2

Arbitration Proceedings 7

Appellate Proceedings 8

REASONS WHY THE PETITION SHOULD BE DENIED 9

I. The Second Circuit's Minor Dispute Decision Was Fully Consistent With This Court's Conrail Decision 11

Page

II. The Second Circuit's Holding That the Dispute Over CSXT's Abolishment of Positions Upon the Sale of the Buffalo-Eidenau Line Remained a Minor Dispute Did Not Conflict With Conrail 14

III. This Case Does Not Present an Issue of National Importance 20

CONCLUSION 23

TABLE OF AUTHORITIES

CASES **Page**

Alexander v. Gardner - Denver Co., 415 U.S. 36 (1974) 8

Andrews v. Louisville & N.R.R., 406 U.S. 320 (1972) 19

Atchison, T. & S.F. Ry. v. RLEA, No. 87-C-9847, 1988 WL 116502 (N.D. Ill. 1988), *appeal dismissed*, No. 89 - 1468 (7th Cir. Aug. 3, 1989) 13

Baltimore & O.R.R. v. Brotherhood of Ry., Airline & Steamship Clerks, 108 (CCH) Lab. Cas. ¶ 10,261 (4th Cir. 1987), *cert. denied, sub. nom Transportation Communications Union v. Baltimore & O.R.R.*, 464 U.S. 1008 (1988) 8

Brotherhood of Locomotive Engineers v. Atchison, T. & S.F. Ry., 768 F.2d 914 (7th Cir. 1985) 6

Brotherhood of Locomotive Engineers v. Louisville & N.R.R., 373 U.S. 33 (1963) 18

Brotherhood of Locomotive Engineers v. Missouri K.T.R.R., 363 U.S. 528 (1960) 19

Brotherhood of R.R. Trainmen v. Chicago R. & I.R.R., 353 U.S. 30 (1957) 9

Page

Chicago & N.W. Transportation Co. v. RLEA, 855 F.2d 1277 (7th Cir.), *cert. denied*, 109 S. Ct. 493 (1988), *reh'g denied*, 109 S. Ct. 885 (1989) 13,16

Consolidated Rail Corp. v. RLEA, 109 S. Ct. 2477 (1989) . . . . . passim

CSX Transportation, Inc. v. United Transportation Union, 879 F.2d 990 (2d Cir. 1989) 1

CSX Transportation, Inc. v. United Transportation Union, No. 88-1404C (W.D.N.Y. argued June 30, 1989) 8

Decker v. CSX Transportation, Inc., 672 F. Supp 674 (W.D.N.Y. 1987) 3

Detroit & Toledo Shore Line R.R. v. United Transportation Union, 396 U.S. 142 (1969) 12

Elgin, J. & E.R. Co. v. Burley, 325 U.S. 711 (1945) 17

General Committee of Adjustment v. CSX R.R., Cir. No. 87-1712 (M.D. Pa. Feb. 24, 1989), *appeal pend'g*, No. 89-5246 (3rd Cir. argued Oct. 23, 1989) 13

Page

Maine Central R.R. v. United Transportation Union, 787 F.2d 780 (1st Cir.), *cert. denied*, 107 S. Ct. 169 (1986) 13

Order of Railway Conductors v. Pitney, 326 U.S. 561 (1946) 19,20

RLEA v. Pittsburgh & L.E.R.R., 845 F.2d 420 (3d Cir.1988), *rev'd*, 109 S. Ct. 2584 (1989) 3,12,22

RLEA v. Boston & Maine Corp., 664 F. Supp 605 (D. Me. 1987) 22

Rutland Ry. v Brotherhood of Locomotive Engineers, 307 F.2d 21 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963) 13

Slocum v. Delaware, L & W. R.R., 339 U.S. 239 (1950) 20

St. Louis S.W. Ry. v. United Transportation Union, 646 F.2d 230 (5th Cir. 1981) 5

STATUTES

11 U.S.C. § 205 19

45 U.S.C. § 152, Seventh . . . . . *passim*

45 U.S.C. § 153, First . . . . . *passim*

45 U.S.C. § 153, Second 7

Page

45 U.S.C. § 155 12

45 U.S.C. § 156 2,13

45 U.S.C. § 160 13

49 U.S.C. § 10901 3,7

LEGISLATIVE MATERIALS

S. Rep. No. 89-1201, 89th Cong., 2d Sess. (1966) 19

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT CSX TRANSPORTATION, INC.'S BRIEF IN OPPOSITION

Respondent CSX Transportation, Inc. ("CSXT") respectfully requests that this Court deny the petition for writ of certiorari submitted by the United Transportation Union, *et al.* (hereinafter "unions"), seeking review of the Second Circuit's decision reported at 879 F.2d 990 (2d Cir. 1989) (hereinafter cited as *"CSXT v. UTU"*).[1] The Second Circuit's

[1] The petition was filed on behalf of eleven unions and twenty-six union officials. Pet. at 1 & Appendix I thereto. The petition notes that one sub-unit of a petitioning union reached a settlement agreement with CSXT. *Id.* at n.1. In fact, CSXT has reached agreements with four of the petitioning unions and their sub-units,

decision was fully consistent with *Consolidated Rail Corp. v. RLEA*, 109 S.Ct. 2477 (1989) (hereinafter "*Conrail*") and provides no basis for review by this Court of a subject so recently treated in *Conrail*, *i.e.*, application of the standard for a minor dispute within the meaning of the Railway Labor Act.

COUNTERSTATEMENT OF THE CASE

District Court Proceedings

This case arises out of the abolishment of positions and furlough of employees associated with the sale by CSXT of a marginal line of railroad between Buffalo, New York and Eidenau, Pennsylvania (hereinafter "Buffalo-Eidenau Line") to a new shortline railroad, which had agreed to offer employment to CSXT employees who worked on the line. App. 42a.[2] One of CSXT's unions initially tried to block the sale by obtaining an ex parte restraining order in state court. The union argued that implementation of the sale without prior bargaining raised a major dispute within the meaning of the Railway Labor Act ("RLA"), because the union had served a bargaining proposal under Section 6 of the RLA, 45 U.S.C. § 156 (a so-called Section 6 notice), seeking to bargain over the sale. The union claimed CSXT was required by the RLA's status quo requirement to continue operating the Buffalo-Eidenau Line until the RLA's bargaining processes

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as explained *infra* at 20. These unions are the United Transportation Union ("UTU"); UTU(E); UTU, Yardmasters Department; and Brotherhood of Locomotive Engineers.

[2] As of the District Court's decision, 113 CSXT employees had accepted employment with the purchaser. App. 42a n.6.

had been exhausted. CSXT removed the case to Federal District Court in *Decker v. CSXT*, 672 F. Supp. 674 (W.D.N.Y. 1987). CSXT there contended that the parties' disagreement presented, at most, a minor dispute within the meaning of the RLA.[3] There is no requirement to maintain the status quo in a minor dispute. Alternatively, CSXT contended that the RLA's bargaining and status quo requirements were superceded by the Interstate Commerce Commission's ("ICC") exclusive jurisdiction over the sale under Section 10901 of the Interstate Commerce Act, 49 U.S.C. § 10901. The District Court initially dismissed the unions' complaint on the basis of the ICC's jurisdiction and did not reach any RLA issue.

Several of CSXT's unions then threatened to strike CSXT if it went forward with the sale. CSXT brought its own action in the Western District of New York to enjoin the threatened strike. The unions counter-claimed that the sale violated the RLA's bargaining and status quo requirements. The unions also sought reconsideration of *Decker v. CSXT* in light of the then intervening decision by the Third Circuit in *RLEA v. Pittsburgh & L.E.R.R.*, 845 F.2d 420 (3d Cir. 1988), *rev'd*, 109 S.Ct. 2584 (1989) (hereinafter "*P&LE*").

Based on the Third Circuit's *P&LE* decision, the District Court reversed its *Decker v. CSXT* holding. App. 50a-52a. The District Court then proceeded to consider the

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[3] A major dispute is a disagreement arising out of the change or formation of a collective bargaining agreement and involves the acquisition of rights for the future. A minor dispute is a disagreement over the meaning or application of rights in existing collective bargaining agreements or past practices and is subject to compulsory and binding arbitration. *See generally, e.g., Conrail*, 109 S. Ct. at 2479-81.

parties' RLA arguments. The unions argued the sale would "change" rights in collective bargaining agreements without first complying with the RLA's major dispute procedures for amending agreements, in violation of Section 2, Seventh of the RLA, 45 U.S.C. § 152, Seventh. Although not disclosed by their petition to this Court, the unions also argued that abolishment of positions as a result of the sale would violate certain of their agreements with CSXT. They further argued that their Section 6 notices invoked the RLA's status quo requirement, which they asserted precluded the sale. CSXT took the position that the sale did not violate or change agreements and that CSXT did not have to bargain prior to abolishing positions no longer needed after the sale, because the parties' agreements already addressed the effects of job abolishment and reductions-in-force on employees. These agreements recognized CSXT's right unilaterally to reduce forces when necessary, subject only to the requirements that furloughs be in reverse seniority order and that a specified notice (generally 5 or 10 days) be posted prior to a job abolishment. App. 57a.[4] The agreements also provided that an employee whose position was abolished could exercise his or her seniority to bid on other positions. If no positions were available, the employee was placed on furlough status, subject to recall. CSXT's unions had prior opportunities to bargain for monetary and other compensation for employees whose jobs were abolished, including as a result of line sales, and certain of CSXT's agreements already provided for wage guarantees, severance payments or other benefits for employees affected by job abolishment. App. 43a.- 44a.

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[4] A typical provision stated that "[w]hen it becomes necessary to reduce expenses, the forces at any point or in any department or subdivision thereof shall be reduced ...." App. 57a.

These protections ranged in duration from five years to wage protection for the employee's working life. Moreover, the Buffalo-Eidenau sale was hardly CSXT's first disposition of a rail line. CSXT, and a predecessor, the Baltimore and Ohio Railroad ("B&O)", had a past practice of disposing of marginal or unprofitable lines of the former B&O system, through sale or abandonment, without objection by the unions that their disposition violated employees' rights under collective bargaining agreements or the RLA. App. 58a - 59a. This practice included the sale over the past ten years of ten marginal line segments, as an alternative to their eventual abandonment. Because the parties' disagreement required the interpretation of these agreements and practices under them, it was a minor dispute.[5]

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[5] CSXT also argued that the unions' initial Section 6 notices (served in 1987 and early 1988) were precluded by moratorium provisions in the parties' collective bargaining agreements, which barred the service of Section 6 notices before April 1, 1988. A dispute over the moratoria's applicability was itself a minor dispute, which had to be resolved before there was any bargaining obligation. *See, e.g., St. Louis S.W. Ry. v. United Transportation Union*, 646 F.2d 230, 233 (5th Cir. 1981) ("it is clear under existing law that the possible preclusion of the union's caboose proposal by the moratorium provision created a 'minor' dispute . . . ."). Although the District Court found CSXT's argument had merit, it concluded that the moratorium issue became moot when the unions served new Section 6 notices after the moratoria's expiration. App. 54a n.10. Those Section 6 notices were served well after the litigation had commenced and after CSXT had entered an agreement to sell the Line.

After careful consideration,[6] the District Court held that CSXT had presented a non-frivolous argument that its written agreements and past practices arguably justified the unilateral abolishment of unneeded positions. Therefore, the parties' disagreement was a minor dispute. The Court directed that the dispute be submitted to arbitration in accordance with the RLA's minor dispute resolution procedures and enjoined the unions from striking over the minor dispute.[7] The District Court rejected the unions' request for an injunction of the sale pending arbitration. App. 69a.

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[6] The District Court held four days of hearings, heard eight witnesses, and received nearly 100 exhibits. App. 43a. The District Court's behavior certainly does not justify the unions' feckless claim that district courts classify disputes as minor simply to lighten their case loads. Pet. at 11. Moreover, an inclination to classify disputes as minor is not "a misdirected predisposition . . . to prevent strikes." The very purpose of the minor dispute procedures is to resolve disagreements peacefully without labor strife. Thus, this and the appellate courts have recognized that doubts are to be resolved in favor of a minor dispute holding. *See, e.g., Conrail*, 109 S. Ct. at 2484 ("Full utilization of the Board's procedures also will diminish the risk of interruptions in commerce."); *Brotherhood of Locomotive Engineers v. Atchison, T. & S.F. Ry.*, 768 F.2d 914, 920 (7th Cir. 1985) (in close cases minor dispute classification favored to avoid strikes).

[7] Alternatively, CSXT argued that, even if the dispute were classified as a major dispute, the status quo included CSXT's right to sell lines of railroad and abolish unneeded positions. Because of the District Court's resolution of the case, it never reached CSXT's alternative argument that the sale and abolishment of positions would not violate the status quo.

The unions then appealed the District Court's minor dispute holding to the Second Circuit, but did not appeal the District Court's refusal to enter an injunction pending arbitration. CSXT did not appeal the District Court's holding that the ICC's jurisdiction under Section 10901 of the Interstate Commerce Act did not supplant application of the RLA to this line sale. Thus, the narrow issue presented to the Second Circuit was whether the District Court correctly classified the parties' disagreement as a minor dispute.

Arbitration Proceedings

Before the Second Circuit issued its opinion, the parties, by agreement, submitted their dispute to expedited arbitration before a Special Board of Adjustment, *i.e.*, an arbitration panel, established pursuant to Section 3, Second of the RLA, 45 U.S.C. § 153, Second.[8] The unions claimed that two of their agreements were violated by the unilateral implementation of the sale, but that their agreements otherwise did not address line sales, either to permit or prohibit them. App. 87a. CSXT contended that the broadly worded force reduction provisions in its labor agreements applied to any job abolishment, including those resulting from sales of lines of railroad. The Adjustment Board concluded that CSXT had the right to sell rail lines and that the sale did not violate any collective bargaining agreement. App. 90a, 93a. The Board, however, also concluded that the force reduction provisions could not be applied in a manner that

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[8] Exclusive jurisdiction over minor disputes is in the National Railroad Adjustment Board or an arbitration panel voluntarily agreed to by the carrier and unions. *See, e.g., Conrail*, 109 S. Ct. at 2480-81.

waived the unions' supposed statutory right to bargain over job abolishments prior to the sale's implementation. App. 90a. The Board did not base this conclusion upon any agreement language or past practice, which it found "not dispositive", App. 89a, but on its view that the RLA statutorily required CSXT to bargain over the effects of job abolishment prior to the sale of the rail line. CSXT has appealed the arbitration award, pursuant to 45 U.S.C. § 153, First(q), because the Board's conclusion was based, not upon the collective bargaining agreements, but upon the Board's erroneous interpretation of the RLA's bargaining and status quo requirements. *CSXT v. UTU*, No. 88-1404C (W.D.N.Y. argued June 30, 1989).[9] No decision has yet been issued by the District Court.

Appellate Proceedings

In a post-argument motion, the unions argued to the Second Circuit that, because the arbitration panel had decided the force reduction provisions did not apply to job abolishments resulting from the Buffalo-Eidenau Line sale, the dispute was now a major dispute and the Court of Appeals should summarily vacate the strike injunction and remand the case to the District Court to determine that CSXT had violated the RLA's status quo requirement and Section 2,

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[9] Arbitrators do not have jurisdiction to interpret and apply statutory requirements. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974) (arbitrators interpret law of the shop, not law of the land); *Baltimore & O.R.R. v. Brotherhood of Ry., Airline & Steamship Clerks*, 108 (CCH) Lab. Cas. ¶ 10,261 (4th Cir. 1987), *cert. denied, sub. nom Transportation Communications Union v. Baltimore & O.R.R.*, 464 U.S. 1008 (1988) (arbitrator's award must be based on contract language).

Seventh of the RLA by implementing the sale. The unions also argued that, because the Adjustment Board rejected CSXT's contract interpretation, they were free to strike.

The Second Circuit held that the District Court correctly applied the major/minor dispute analysis and properly found the dispute to be minor. The Court then held that the arbitration award had no bearing on the major/minor dispute classification, because, unlike the Adjustment Board, the District Court's role was not to determine whose contract interpretation was correct, but merely whether those interpretations were non-frivolous. Finally, the Second Circuit ruled, following this Court's decision in *Brotherhood of R.R. Trainmen v. Chicago R. & I. R.R.*, 353 U.S. 30 (1957), that strikes over minor disputes were prohibited and that the unions' exclusive remedy lay with the Adjustment Board or judicial review of the Board's award.

The unions sought rehearing and rehearing en banc, contending that the subsequently issued decision in *Consolidated Rail Corp. v. RLEA*, 109 S. Ct. 2477 (1989) should be interpreted to mean that, if an arbitrator rejects a carrier's interpretation of its rights under existing agreements, the minor dispute is converted into a major dispute. No judge on the Second Circuit voted to rehear the case, and the unions' petition was denied. App. 73a.

REASONS WHY THE PETITION SHOULD BE DENIED

The unions argue that Supreme Court review is warranted for two reasons. First, they contend the Second Circuit's decision is in conflict with this Court's *Conrail* opinion. Second, they claim the case presents an issue of

great importance to the railroad industry, because the Second Circuit's decision somehow precludes unions from ever bargaining over the effects of sales of rail lines. Neither claim is true, and there is no basis for Supreme Court review.

The Second Circuit's decision was fully consistent with *Conrail*. The issue before this Court in *Conrail* was the standard for classifying disputes as major or minor. The Second Circuit applied the same minor dispute standard that was adopted in *Conrail*, and the unions do not claim otherwise. The unions try to manufacture a conflict between the Second Circuit and this Court by mischaracterizing the holdings of both. The Second Circuit's holding that a dispute, once classified minor, remains subject to the RLA's minor dispute procedures did not, as the unions claim, require them to look to arbitrators to remedy statutory violations of the RLA's status quo and bargaining requirements. Those requirements, by definition, do not arise in minor disputes. Moreover, the unions' argument that a minor dispute converts into a major dispute is fundamentally at odds with the statute, which establishes separate, distinct, and mutually exclusive dispute resolution procedures for the two kinds of disputes.

The Second Circuit's decision also did not preclude unions from bargaining over the effects of line sales. The Second Circuit did not hold that such effects were not a bargainable subject. CSXT has not refused to bargain with the unions and has, in fact, reached agreements with four of the petitioning unions covering the effects on employees of the Buffalo-Eidenau Line sale.

Because this case presented nothing more than a straightforward application of the same minor dispute standard

approved in *Conrail*, there is no basis for Supreme Court review, and the petition should be denied.

I. The Second Circuit's Minor Dispute Decision Was Fully Consistent With This Court's Conrail Decision

Contrary to the unions' argument, the "very issue" decided by this Court in *Conrail* was not that a minor dispute converts into a major dispute if the arbitrator rules in favor of the unions. Pet. at 9. The issue in *Conrail* was to "articulate a standard for differentiating between [major and minor disputes] and apply that standard . . ." to the facts of that case. 109 S.Ct. at 2479. The Court adopted as its standard essentially the same standard which had been utilized previously by the various appellate courts, including the Second Circuit. This Court stated that standard as follows: "[w]here an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective-bargaining agreement." *Id.* at 2482-83. The test applied here by the Second Circuit and District Court was substantially the same formulation as the *Conrail* standard. For example, the Second Circuit stated that "[a] dispute will be considered minor, on the other hand, if the contract is 'reasonably susceptible' to the carrier's interpretation." App. 15a.

The Second Circuit's application of this standard to the particular facts before it also does not present an issue for Supreme Court review. While this Court considered the issue of the appropriate standard for a minor dispute in *Conrail*, that was because this Court had never before passed on the appropriate minor dispute test and the Third Circuit had departed from the minor dispute standard previously utilized

by it and other circuits, and approved in *Conrail*, by improperly adding a "meeting of the minds" requirement where the carrier relied solely on past practices to justify its actions. 109 S.Ct. at 2488. In addition, there was a split in the circuits which had considered similar facts whether drug testing disputes were major or minor. 109 S.Ct. at 2479. Now that this Court has spoken on the minor dispute standard, there is no need for it to review every application of that standard by the lower courts. Moreover, the other factors present in *Conrail* were not in this case. There is no claim here that the Second Circuit applied a different standard than that adopted in *Conrail*. There is no split in the Circuits on whether a carrier's reliance on force reduction provisions and past practices to abolish positions upon the sale of a rail line presents a minor dispute.[10] Indeed, every court to reach this question

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[10] The unions' argument, deservedly buried in a footnote, Pet. at 9-10 n.9, that the Second Circuit's classification of this dispute as minor was inconsistent with this Court's opinions in *P&LE* and *Detroit & Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. 142 (1969) (hereinafter "*Shore Line*") is also baseless. As this Court recognized in *Conrail*, "[t]o an extent . . . the distinction between major and minor disputes is a matter of pleading." 109 S.Ct. at 2482. In *P&LE*, neither the carrier nor the unions alleged a minor dispute. The carrier, which was going completely out of business as a railroad, did not rely on its written agreements or past practice for its right to do so. Indeed, this Court noted the collective bargaining agreements were not in the record. 109 S.Ct. at 2593 n.14. The Third Circuit had also recognized no minor dispute issues were present there. 845 F.2d at 428 n.9. Likewise, *Shore Line* did not involve any minor dispute issues. The carrier there did not rely on written agreements or past practice to justify its unilateral change in crew reporting points. 396 U.S. at 154. In *Shore Line*, the Court described the RLA's status quo requirements. Those requirements, and their statutory bases (45 U.S.C. §§ 155,

has classified the dispute as minor. The Seventh Circuit held on very similar facts that a railroad's sale of rail lines and abolishment of positions raised a minor dispute. This Court twice refused to review that minor dispute holding. *Chicago & N.W. Transportation Co. v. RLEA*, 855 F.2d 1277 (7th Cir.), *cert. denied*, 109 S. Ct. 493 (1988), *reh'g denied*, 109 S. Ct. 885 (1989). In *Conrail*, 109 S. Ct. at 2482, this Court favorably cited *Maine Central R.R. v. United Transportation Union*, 787 F.2d 780 (1st Cir.), *cert. denied*, 107 S. Ct. 169 (1986), which similarly held that a carrier's lease of a rail line presented a minor dispute. *Accord General Committee of Adjustment v. CSX R.R.*, Civ. No. 87-1712 (M.D. Pa. Feb. 24, 1989) (line sale presented minor dispute), *appeal pend'g*, No. 89-5246 (3rd Cir. argued Oct. 23, 1989); *Atchison T. & S.F. Ry. v. RLEA*, No. 87-C-9847, 1988 WL 116502 (N.D. Ill. 1988), *appeal dismissed*, No. 89-1468 (7th Cir. Aug. 3, 1989) (line sale presented minor dispute).

Thus, the Second Circuit's minor dispute holding was fully consistent with *Conrail*.

156, 160), do not, however, apply in minor disputes, as this Court recognized in *Conrail*. 109 S.Ct. at 2481. Finally, there is no conflict between *Rutland Ry. v. Brotherhood of Locomotive Engineers*, 307 F.2d 21 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963) and *Chicago & N.W. Transportation Co. v. RLEA*, 855 F.2d 1277 (7th Cir.), *cert. denied*, 109 S.Ct. 493 (1988). Both decisions held that a disagreement over the carrier's right unilaterally to abolish unneeded positions presented a minor dispute.

II. The Second Circuit's Holding That the Dispute Over CSXT's Abolishment of Positions Remained a Minor Dispute Did Not Conflict With Conrail

The Second Circuit's further holding, that the dispute whether the abolishment of jobs was authorized by or violated any agreements remained a minor dispute after the arbitrators' ruling, was also completely consistent with *Conrail*. Contrary to the unions' erroneous characterization, this Second Circuit holding did not "Requir[e] Petitioners To Look To The Adjustment Boards For Relief From CSXT's Violations Of The Railway Labor Act's Bargaining And Status Quo Commands . . . In Direct Conflict With . . . *Conrail*". Pet. at 13. Petitioners' argument ignores the fact that the RLA's "bargaining and status quo commands" do not arise in minor disputes. For example, this Court recognized in *Conrail* that, in a minor dispute, "this Court never has recognized a general statutory obligation on the part of an employer to maintain the status quo pending the Board's decision."[11] *Accord CSXT v. UTU*, App. 14a. The unions' related argument, Pet. at 15, that CSXT's continued operation of the Buffalo-Eidenau Line had become "part of the actual, objective working conditions of the employees," which conditions were frozen by the RLA's status quo obligation when the unions served their Section 6 notices, is similarly misplaced. The mere service of Section 6 notices did not transform the dispute into a major dispute.

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[11] This Court recognized that, in certain limited circumstances, a District Court could condition a strike injunction upon the carrier's maintenance of the status quo pending arbitration proceedings. 109 S. Ct. at 2481. Here, the unions did not appeal the District Court's refusal to so condition its injunction. The Second Circuit was unaware the unions had sought such a condition, because its denial was not appealed. App. 29a n.10.

Conrail, 109 S. Ct. at 2482 (courts are not bound by parties' characterization of the dispute); *accord*, *CSXT v. UTU*, App. 20a - 21a. Moreover, because the status quo requirement does not apply in a minor dispute, there was no basis for the District Court to define working conditions embraced by the status quo to include continued operation of the line by CSXT. In that regard, the unions' claim that the District Court found that the sale changed working conditions is equally erroneous. Pet. at 14-15. Because the District Court classified the dispute as minor, it made no determination whether working conditions were changed or violated. App. 27a n.9. Although not an issue in this case, the unions' definition of the status quo is also erroneous. This Court in *P&LE* rejected the same argument that the mere fact that a railroad has operated a rail line makes the carrier's continued operation of that line a working condition. 109 S. Ct. at 2593 ("state of being employed" is not a working condition) and 2594 ("there was no reason to expect, simply from the railroad's long existence, that it would stay in business . . . .").

Similarly, the unions' argument that the sale "changed" employees' contractual rights, in violation of RLA Section 2, Seventh and that adjustment boards cannot remedy violations of Section 2, Seventh is a complete red herring, because Section 2, Seventh applies only to a major dispute, not to a minor dispute. For example, this Court explained in *Conrail* that "[t]he statutory bases for the *major* dispute category are *§ 2, Seventh* and § 6 of the RLA . . . . [i]n contrast, the minor dispute category is predicated on § 2, Sixth and § 3, First(i) of the RLA . . . ." 109 S. Ct. at 2480 (emphasis added). Thus, because the RLA's status quo and bargaining requirements do not arise in minor disputes, the Second Circuit could not possibly be asking the Adjustment Board to determine whether CSXT had violated those statutory requirements. As the

Second Circuit noted, App. 30a, this same union claim that an adjustment board cannot provide a remedy, because no contractual right was violated, was the basis for the unions' unsuccessful attempt to obtain rehearing by this Court of denial of certiorari in *Chicago & N.W. Transportation Co. v. RLEA*, 855 F.2d 1277 (7th Cir.), *cert. denied*, 109 S. Ct. 493 (1988), *reh'g denied*, 109 S. Ct. 885 (1989).

Language selected by the unions from the Court's opinion and Justice White's concurrence in *Conrail* does not support their argument that *Conrail* held that a minor dispute over a carrier's right to act converted into a major dispute if the carrier later were found by an arbitrator not to have a contractual justification for its action. This Court in *Conrail* stated that the "onset" of the bargaining (*i.e.*, major dispute) process could be delayed "until the Board determines on the merits that the employer's interpretation of the agreement is incorrect . . . ." 109 S. Ct. at 2484. The unions are here trying to blur the distinction between two different disputes and merge them into one subject to the RLA's major dispute procedure. One dispute was the parties' disagreement whether CSXT could unilaterally abolish positions after a line sale. That dispute required the interpretation of existing agreements and was a minor dispute. The other dispute was the unions' efforts to obtain new rights admittedly not contained in existing agreements addressing the effects of the Buffalo-Eidenau line sale. That dispute, involving future rights, is a major dispute. *Conrail* cannot be fairly read to mean that the former minor dispute became subject to the RLA's major dispute procedures when the arbitrators disagreed with CSXT's interpretation of the force reduction provisions. Such a reading ignores the fact, long recognized by this Court, that the statute establishes two, separate and distinct, and mutually exclusive procedures, for resolving major and minor disputes.

See, e.g., Conrail, 109 S. Ct. at 2480 (*citing Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 723 (1945) (" Congress has drawn major lines of difference between the two classes of controversy")).

The unions' argument is really nothing more than a re-working of their "hybrid" dispute argument already rejected by this Court in *Conrail*. There, these same rail unions argued that they could maintain a district court action and obtain a status quo injunction against unilateral carrier action until the carrier demonstrated in arbitration proceedings that its view of its rights under collective bargaining agreements and/or past practices was correct. 109 S.Ct. at 2483. Here, the unions are again arguing dual jurisdiction over a minor dispute "between federal court and adjustment board . . . as not being mutually exclusive . . ." Pet. at 17. Only this time, they argue the district court can find that the carrier violated the status quo after, rather than before, the arbitration if the carrier's contract interpretation is not upheld in arbitration.

Under the unions' logic, if an arbitrator were later to find that Conrail's drug testing procedures were not authorized by past practices, then a district court could find Conrail's implementation of drug testing violated Section 2, Seventh of the RLA, even though Section 2, Seventh did not apply at the time the testing was implemented. Such a result makes no sense and would have the same effect disapproved by *Conrail* of "requiring employers rigidly to maintain the status quo pending arbitration of their right to be flexible." *Id.* at 2483. Otherwise, if the carrier acted on its contract interpretation during arbitration, it runs the risk of being found after the fact to have violated the statute or to be subject to a strike. While the unions have down-played this latter aspect of their argument before this Court, the Second Circuit clearly

understood the import of their argument, stating that "the obvious implication of Appellants' application to vacate the District Court's anti-strike injunction is that, having prevailed before the Board, Appellants are now entitled to strike." App. 28a. However, the unions' position is completely at odds with the statute's requirement, as applied by this Court, that minor disputes be resolved peacefully. *Conrail*, 109 S. Ct. at 2481 ("Courts may enjoin strikes arising out of minor disputes."). *See also, e.g., Brotherhood of Locomotive Engineers v. Louisville & N.R.R.*, 373 U.S. 33, 40 (1963) (a union cannot strike over an Adjustment Board award).

Thus, the Second Circuit's decision that the dispute remained minor and the unions' remedies were limited to those provided by the RLA's minor dispute procedures, including judicial review of the arbitration award, was fully consistent with the RLA and this Court's decision in *Conrail*. The Second Circuit's holding was also consistent with this Court's long-standing precedents that the RLA's minor dispute procedures are "a mandatory, exclusive and comprehensive system," *Brotherhood of Locomotive Engineers v. Louisville & N.R.R.*, 373 U.S. at 38; adjustment boards have exclusive jurisdiction over minor disputes, *Conrail*, 109 S. Ct. at 2481; and that, under the statute, 45 U.S.C. § 153, First (p), (q), the role of the district court in minor disputes is limited to reviewing or enforcing arbitration awards, and the scope of

that role is exceedingly narrow,[12] *Conrail*, 109 S. Ct. at 2481; *Andrews v. Louisville & N.R.R.*, 406 U.S. 320, 325 (1972).

The unions' reliance on *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 567-68 (1946), for their theory that district courts and adjustment boards can share jurisdiction over a minor dispute is also completely misplaced. Pet. at 17-18. First, the district court there was exercising jurisdiction under the bankruptcy laws as overseer of a bankrupt railroad. *See Brotherhood of Locomotive Engineers v. Missouri K.T.R.R.*, 363 U.S. 528, 533 (1960) ("In *Pitney*, we held that the District Court in exercise of its equity powers ancillary to its jurisdiction as railroad reorganization court under 11 U.S.C. § 205, should not have granted a permanent injunction . . . ."). Second, because *Pitney* found the underlying dispute to be minor, the district court was not adjudicating a violation of RLA Section 2, Seventh, which does not even arise in a minor dispute. *Pitney* did recognize that the RLA vests exclusive jurisdiction over minor disputes in adjustment boards and "intended to leave a minimum responsibility to the courts." *Id.* at 565-66. Thus, *Pitney* does not support the unions' effort

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[12] In 1966, Congress amended the RLA's provisions relating to judicial review or enforcement of adjustment board awards. Congress made clear its intention that judicial involvement in minor disputes be limited, by providing a very narrow standard of review. S. Rep. No. 89 - 1201, 89th Cong., 2d Sess. 2-3 (1966). Contrary to this intent, the unions would greatly expand judicial involvement in minor disputes by arguing that a court may convert a minor dispute into a major dispute following arbitration.

to enlarge court jurisdiction by converting a minor dispute into a major dispute.[13]

III. This Case Does Not Present an Issue of National Importance

The unions also argue that Supreme Court review is necessary, because the Second Circuit's decision allegedly frustrates the ability of unions to bargain over sales of lines of railroad and this raises an issue of national importance. Pet. at 13. The unions broadly assert that the Second Circuit "has given CSXT and other railroads a strong incentive to refuse to negotiate a solution to the line sale dispute." Nothing in the Second Circuit's opinion supports this sweeping and unsupported claim. Certainly, the Second Circuit did not hold that as a general proposition unions can never bargain over line sales or their effect on employees. Moreover, the Second

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[13] The unions take *Pitney's* statement that the district court should stay any action until after arbitration, 326 U.S. at 567-68, out of context. The Court made that statement by way of criticism of the district court, which had interpreted a railroad labor agreement rather than remand that question to an arbitrator. Thus, *Pitney* cannot be read to create jurisdiction in district courts over minor disputes, pursuant to Section 2, Seventh of the RLA. Such a reading needlessly brings *Pitney* into conflict with the statute and *Conrail*, which rejected dual jurisdiction in the courts and arbitrators over minor disputes. This Court has interpreted *Pitney* to mean that district courts should not exercise jurisdiction over minor disputes. *See, e.g., Slocum v. Delaware, L. & W.R.R.*, 339 U.S. 239, 243-44 (1950). Any action taken by the district court in *Pitney* after the arbitration would have been pursuant to 45 U.S.C. § 153, First (p) or (q), not 45 U.S.C. § 152, Seventh, to enforce or review the arbitration award.

Circuit's statement that CSXT had no bargaining obligation over the unions' Section 6 notices targeted to the Buffalo-Eidenau line sale was consistent with *Conrail's* statement that the "onset" of the bargaining process could be delayed pending arbitration of contract interpretation disputes. In fact, there was no delay here, because CSXT bargained over the effects of this sale and has reached agreements with the four unions which represent most of the employees who did not already have some form of monetary protection under existing collective bargaining agreements in the event their jobs were displaced by a line sale.[14] These agreements settled both the unions' Section 6 notices as well as litigation between the parties arising from the sale.

In addition, rail unions have served general Section 6 notices covering many subjects, including line sales, on the nation's major railroads. The unions are currently in bargaining with the bargaining agent for those railroads participating in multi-employer bargaining over these notices. Thus, the Second Circuit's ruling has not barred the unions'

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[14] Most of the employees in the non-operating crafts affected by the sale already were eligible for monetary benefits under existing agreements. App. 43a. The unions with whom CSXT has reached agreements mainly represent employees in the operating crafts, where existing agreements contain few furlough benefits.

efforts to address line sale issues through bargaining.[15] The "national importance" argument therefore provides no basis for Supreme Court review.

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[15] Disagreements may arise whether any and all topics over which unions seek to bargain relating to line sales may be a mandatory or permissive subject of bargaining. For example, this Court held in the *P&LE* case that an employer did not have to bargain over union proposals which would require the line sale agreement to be re-negotiated. 109 S. Ct. at 2597. However, issues relating to the scope and nature of any bargaining obligation did not arise in the lower courts here and provide no basis for Supreme Court review. *Cf. RLEA v. Boston & Maine Corp.*, 664 F. Supp. 605, 616-17 (D. Me. 1987) (disagreement whether an item in a Section 6 notice presents a mandatory or permissive bargaining subject not justiciable until a party seeks to exercise self-help to force agreement).

CONCLUSION

For the reasons set forth, the petition for writ of certiorari should be denied.

Respectfully submitted,

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